SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 126.

THE UNITY BANKING AND SAVING COMPANY,
APPELLANT,

vs.

GILBERT BETTMAN, TRUSTEE OF HOLZMAN & CO., BANKRUPTS, AND RICHARD FRITZ.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR APPELLEE, RICHARD FRITZ.

THEODORE HORSTMAN,
Counsel for Richard Fritz,
one of the Appellees.

(21,108.)

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BRIEF FOR APPELLEE, RICHARD FRITZ.

[For brevity, we will hereinafter call the fifty shares of preferred stock of the Philip Carey Manufacturing Company, which shares of stock are herein involved, the "Carey stock," and the fifty shares of preferred stock of the Cincinnati, Newport & Covington Railway Company, which are frequently referred to in the evidence, the "C., N. & C. stock," and the Unity Banking & Saving Company, the "Unity Bank."]

Statement of Case.

This cause is a controversy arising in the bankruptcy proceedings of Holzman & Co., formerly a firm of stock brokers doing business in Cincinnati, Ohio. The cause was originally tried before a referee upon the following pleadings, viz:

The amended petition of Richard Fritz (Rec., pp. 19, 20), which alleges that he is the owner of fifty shares of "Carey stock" and the certificate therefor; that the "Unity Bank" at the time of the commencement of the proceedings in bankruptcy had possession of such certificate and claimed some lien or interest therein; that the said certificate had been placed in possession of said bank by Holzman & Co. prior to the bankruptcy proceedings, but *that since the commencement of such bankruptcy proceedings the "Unity Bank" had in open court surrendered said certificate to the trustee in bankruptcy of Holzman & Co.,* subject to the right of the "Unity Bank" to set up whatever lien or interest it might have in said "Carey stock," and *that such certificate is now in the possession and custody of said trustee in bankruptcy,* and that said trustee wrongfully detains such certificate from Richard Fritz.

Wherefore Richard Fritz asks for an order upon the trustee in bankruptcy to deliver said certificate to him free of all lien and interest therein of the "Unity Bank."

The answer of the trustee in bankruptcy (Rec., pp. 10, 11) was voluntarily filed, no notice or writ having been served upon him. The answer avers that said "Carey stock" was regularly hypothecated by Richard Fritz, with Holzman & Co. as security, for moneys advanced and to be advanced by Holzman & Co. to Richard Fritz.

Wherefore the trustee prays the court to determine the controversy between Richard Fritz and the "Unity Bank," to make such order as will protect the interests of the trustee in the premises, and for other relief.

The answer of the "Unity Bank" to the amended petition of Richard Fritz (Rec., pp. 22, 23, 24) was also voluntarily filed by it, no writ or notice having been served. It says that Holzman & Co. pledged the said "Carey stock," together with certain other collateral, with the bank as security for a demand note for $10,000 and other loans; that it advanced money to Holzman & Co. on the faith

thereof and allowed a continuing credit on the faith thereof; that Holzman & Co. defaulted in payment of said loan, and the "Unity Bank" thereupon sold the other collateral, excepting the "Carey stock," and that the balance due by Holzman & Co. to it on such loan is still $4,965.68, and interest; that it took the said "Carey stock" from Holzman & Co. without knowledge of the claim of Richard Fritz to the stock; that to the said certificate for the "Carey stock" was attached at the time the bank received it a power of attorney signed in blank by Richard Fritz, or with his name by his consent and authority; that Richard Fritz never tendered to the "Unity Bank" the amount of his pledge indebtedness to the bankrupts prior to the commencement of this proceeding; and that Fritz is estopped to make any claim to the "Carey stock" until all the indebtedness of Holzman & Co. to the "Unity Bank" is first paid.

Wherefore the "Unity Bank" prays that it may be adjudged to be entitled to retain the certificate or the proceeds of sale therefrom, and to apply the same on the loans for which it was pledged by Holzman & Co. to the "Unity Bank."

The reply of the trustee in bankruptcy to the answer of the "Unity Bank" (Rec., 24) says that the "Unity Bank" took from Holzman & Co. as security for the $10,000 note mentioned in its answer, certain collateral, including the "Carey stock," which was expressly hypothecated for that particular note and none other, and it denies that said collateral was taken as security for any indebtedness other than said $10,000 note mentioned in the answer. It further denies that the "Unity Bank" advanced any other money or allowed a continuing credit on the faith of the collateral.

Wherefore the trustee prays the court to determine the controversy between Richard Fritz and the "Unity Bank" as to the ownership of the "Carey stock;" that before any order is made upon the trustee in respect to the delivery of the "Carey stock," the "Unity Bank" be first required to

surrender and deliver the physical possession thereof to him, and thereupon to make such order in the premises as may be just and proper and to protect the interest of said trustee in the premises, and for other relief.

The reply of Richard Fritz to the answers of the "Unity Bank" and of the trustee (Rec., pp. 26, 28) sets up a general denial, and further says, in substance, that what purports to be Fritz's signature to the power of attorney attached to the "Carey stock" is a forgery; that he did not pledge the "Carey stock" certificate with Holzman & Co., but that the same was placed in their possession solely for the custody of the same until occasion might arise to sell or hypothecate or reclaim the same; that he had no knowledge that Holzman & Co. had attempted to transfer or hypothecate the "Carey stock" certificate with the "Unity Bank" until after the bankruptcy proceedings were commenced, and that he thereupon immediately made demand for the redelivery of the same; further, that at no time had Holzman & Co., prior to the bankruptcy proceedings, made any demand upon him for any indebtedness of his to them which he did not forthwith pay; that at the time of the bankruptcy proceedings he was not indebted to Holzman & Co., but, on the contrary, they were indebted to him, because they had, prior thereto, misappropriated to their own use fifty shares of "C., N. & C. stock" belonging to him, which were worth about $4,600, so that they were in fact indebted to him in the sum of about $3,667.50 at the time of the commencement of the proceedings in bankruptcy.

It will be observed that all said parties voluntarily entered their appearances, that each submitted his claims of interest in the certificate and stock to the referee, and none of them denied the referee's jurisdiction.

The referee entered judgment in favor of Richard Fritz (Rec., p. 29).

The "Unity Bank" filed a petition for review in the Circuit Court (Rec., pp. 30, 31, 32). Henry P. Boyden, trus-

tee, did not join in such petition for review, nor did he file any separate petition for review. Nor did the trustee appeal from the judgment of the District Court to the Circuit Court of Appeals, nor from the judgment of that court to this court. The trustee was therefore made party appellee in the District Court and in the Circuit Court of Appeals and in this court.

Jurisdiction of the Referee.

Pursuant to agreement of all parties and counsel, the "Carey stock" certificate before the hearing was legally and technically placed in possession of the trustee and court, as alleged in the amended petition of Richard Fritz. That allegation of the amended petition is not denied in any pleading of the "Unity Bank," or of the trustee. The cause went to trial with that understanding. Further, to confirm this, see the following:

(Rec., p. 61): "Mr. Dolle, attorney for the Unity Banking and Saving Company, states that the certificate of the Philip Carey preferred stock is in his custody, subject to the order of this court."

The "Unity Bank" offered the certificate in evidence (Rec., 170).

It will be observed that the trustee, on behalf of the creditors of Holzman & Co., made certain claims of interest in the "Carey stock," claiming that the same was pledged by Holzman & Co. with the "Unity Bank" to secure a certain specific note indebtedness, and not a general indebtedness for $10,000. It was also claimed in the evidence by the trustee, on behalf of the creditors, that Fritz was indebted to Holzman & Co. in the sum of $920, and that therefore he, as trustee, had a lien on the "Carey stock" as against Fritz for that amount. The trustee prayed the court to adjudicate the several claims, and to protect the interests of the trustee, and for such other relief as he might be entitled to.

After the decision of the referee in favor of Richard Fritz, by request of counsel for the "Unity Bank" the judgment entry (Rec., p. 30) provided as follows: "It is hereby further ordered that the said certificate of stock for the said fifty shares of the preferred stock of the Philip Carey Manufacturing Company *remain* and be in the custody of the said Charles T. Greve, referee, until a final determination of and a final decision upon the said petition for review."

The trustee and his counsel were present and took part in the entire hearing.

We submit, therefore, that inasmuch as the trustee claimed an interest in the "Carey stock" for the benefit of the creditors of Holzman & Co., and as the stock certificate was by express agreement of counsel technically placed in the possession of the trustee and court in order to avoid all technical question about the jurisdiction of the referee in the premises, and the case has proceeded to trial up to this court without any question being raised as to the jurisdiction of the court on that ground, this controversy was properly within the jurisdiction of the referee.

178 U. S., 524, Bardes *v.* Bank: "The District Court of the United States can, by the proposed defendant's consent, but not otherwise, entertain jurisdiction over suits brought by trustees in bankruptcy to set aside fraudulent transfers of money or property made by the bankrupt to other parties before the institution of the bankruptcy proceedings."

In 93 U. S., 350, Wiswall *v.* Campbell, the court, in its opinion, says: "Every person submitting himself to the jurisdiction of the bankrupt court in the progress of the case for the purpose of having his rights in the estate determined, makes himself a party to the suit and is bound by what is judicially determined in the legitimate course of the proceeding, and a creditor, who offers proof of his claim and demands its allowance, subjects himself to the dominion of the court and must abide the consequences."

105 Fed. Rep., 180, *In re* Whitener (Rodgers *v.* Ramseur):

Syl. 1. "A court of bankruptcy has jurisdiction under the provisions of section 2 of the Bankruptcy Act of 1898, to entertain a petition of intervention by a claimant in bankruptcy proceedings and to determine the issues presented thereby." (See also pp. 185, 186.)

On page 186 the court said: "Jurisdiction of the District Court, as thus granted, is unquestionably bankrupt jurisdiction, and not general jurisdiction to hear and determine controversies between adverse parties."

Neither in its demurrer nor in its answer to the amended petition of Fritz did the Unity Bank set up want of jurisdiction in the referee. Only after the decree and order by the referee did the bank claim want of jurisdiction in the referee. In fact, by agreement of all counsel a replevin action for the certificate in a State court was dismissed in order that all questions might be determined in the bankruptcy court.

The Referee's Findings.

The report and certificate of the referee and his opinion are very complete and clear (Rec., 34-35.) The referee found all disputed questions of fact and law in favor of Richard Fritz. The District Court (Rec., 216-7) found "no error in the rulings, findings and order of the referee," and therefore affirmed them. The Circuit Court of Appeals, in affirming the judgment of the District Court (Rec., 242), said, "It is quite unnecessary to go into a rediscussion of the questions of fact and law so ably handled by the referee." Nevertheless, the brief of counsel for appellant asks this court to review the findings of the referee and of the lower courts as to certain questions of fact. If we succeed in placing before this court fully and clearly the established facts in this case, we think it will be quite unnecessary for the court to consider many of the questions of law presented in appellant's brief.

We therefore submit the following summary from the opinion and report of the referee:

Holzman & Co., a firm of brokers, made an assignment for the benefit of creditors on May 25, 1905. On July 1, 1905, upon proceedings instituted on May 26, 1905, said firm was adjudicated bankrupt. Richard Fritz was dealing with the brokerage firm as a customer and some time in May, probably the 13th, he placed in the hands of Ross Holzman, a member of the firm, a certain certificate for fifty shares of $100.00 each of "Carey stock," said certificate being in the name of Fritz Bros., and endorsed over upon the back by "Fritz Bros., per Otto Fritz," to Richard Fritz. The stock had not been transferred on the books of the company to Richard Fritz. On May 15, 1905, this certificate of stock was pledged by Holzman & Co. with the "Unity Bank" as security upon a note for $10,000.00 executed by the firm to the bank. At the time this certificate was pledged by Ross Holzman with the bank, there was pinned to it a power of attorney purporting to have been signed by Richard Fritz, with Ross Holzman as witness thereto. None of the blanks of the power of acknowledgment are filled and the only writing on the paper includes the date, the name "Richard Fritz" in the blank for the signature and "Ross Holzman" in the blank for the attestation. Ross Holzman has been, since shortly after the date of the bankruptcy, beyond the jurisdiction of the court, and his whereabouts are supposedly unknown.

Upon the evidence the referee found the following facts:

1. "That Mr. Fritz did not sign or authorize the signature to the power of attorney in question." (Rec., 36.)

2. "That the 'Carey stock' was deposited with Holzman & Co. upon an express contract that it was simply to be held to show Fritz's responsibility, and not to pass out of Holzman's possession, and that, at no time, was any demand made upon him, or notice served upon him changing the conditions of this contract." (Rec., 38.)

3. "That at the conclusion of the dealings between Fritz and Holzman & Co., Fritz was a creditor of Holzman & Co., and not a debtor." (Rec., 38.)

The referee then finds, as a conclusion of law from the foregoing conclusions of fact, that:

"Where F. deposits with a broker a certificate of stock belonging to F. and in his name, without any endorsement or power to execute or transfer said stock, upon an agreement that said stock is to be held by said broker as an evidence of F.'s financial responsibility only, and is not to leave the broker's possession, and the broker pledges said certificate to a bank as security upon a note of the broker for money loaned by the bank to the broker for general use of the broker, the bank holds said certificate subject to all the conditions of the original deposit by F. with the broker, and F. is not estopped to claim title to said certificate as against the bank, by the mere placing of said certificate in the hands of the broker, or the further fact, that in the course of dealings between F. and the broker large balances have, at various times, been owed by F. to the broker when it appears that no demand for the payment of such balances was made upon F., or notice served upon him changing the conditions of the deposit of said stock, and, further, that at the conclusion of the dealings between F. and the broker, F. is a creditor and not a debtor of said broker." (Rec., 38-9.)

As to the Forgery.

Counsel for appellants, in their brief, as we understand it, contend that this is an equity proceeding, and that, under the rules of equity pleading and practice, its verified answer to the effect that Richard Fritz either "executed the said blank power of attorney, or authorized the said Holzman & Co., or their predecessors, their agents or employés, to execute it for them in his name," had the force of evidence and could be overcome only by the testimony of at least two witnesses, or of one witness with corroborating circumstances.

If such rule of evidence is applicable at all in this case it governs the claim of the "Unity Bank," as well as the claim of Richard Fritz. The certificate of stock was in the hands of the court or trustee, the referee making certain claims of interest in it and the bank and Fritz also making certain

claims as against the referee and against each other. However, the evidence was abundant in any event to establish the forgery. We quote from the opinion and report of the referee, as follows:

(Rec., 40:)

"The suggestion is made by counsel for the bank that the presumption is against the commission of a crime. The same presumption would apply to the testimony of Mr. Fritz, a witness under oath. Besides, presumption will not avail against positive testimony, particularly, where the point in question is the very issue, or one of the issues in the cause."

(Rec., 41:)

"We have then, in this case, the positive statement of Mr. Fritz that he did not sign the power of attorney, did not authorize the signature, accompanied by the statement of a number of witnesses, who qualified as being more or less familiar with his signature, that they did not think the signature in question genuine, with absolutely no evidence to the contrary."

(Rec., 41:)

"The referee has, however, made a very careful comparison of the signature on the power of attorney and the signature written by Mr. Fritz in his presence, as well as those admitted in evidence in the case for other purposes, and has also compared the signatures used as tests. His comparison has been made both on the basis of the signatures as a totality and upon the basis of the particular letters used in forming the same."

(Rec., 41, 42:)

"But, in the judgment of the referee, there is no resemblance in any important feature in the signature to the power of attorney and any other signature before the court. While one or two letters may be written as are the same letters in other signatures, the possible resemblance seems that of the letters themselves rather than of the way of writing them. Both the first impression of the referee and that as the result of careful comparison of the signatures as an entirety and letter by letter, lead to the judgment that the signature in issue is not genuine."

(Rec., 42:)

"With the uncontradicted statement of Mr. Fritz, the unanimous opinion of those claiming familiarity with Mr. Fritz's writing, practically shaken on cross-examination in but one instance, and what seems to the referee the obvious dissimilarity of the signatures, the referee can come to but one conclusion, that is, that the signature on the power of attorney attached to the Carey certificate of stock is not the signature of Richard Fritz. Mr. Fritz says, further, that he did not authorize anyone to sign the power of attorney for him and this evidence is not contradicted. There is, in fact, no evidence that the power of attorney was ever executed with reference to this particular stock, or attached to it at any time prior to its hypothecation by Ross Holzman with the 'Unity Bank.'"

Theodore Horstman (Rec., 153, 154, 155) testified that a short time after the failure of Holzman & Co. Mr. Fritz, in the presence of Mr. Horstman, said to Ross Holzman, with whom Fritz had left the "Carey stock," that if any signature purporting to be that of Richard Fritz was attached in any way to the "Carey stock" certificate it was a forgery, and that Ross Holzman did not then claim that Richard Fritz had signed the power of attorney, nor did he deny that the signature had been forged, but he promised to make certain arrangements by which Mr. Fritz should be specially secured from loss to the extent of the full value of the "Carey stock;" that pursuant thereto a paper writing to that effect was drawn by Mr. Horstman, but on the day when it was to have been executed by Ross Holzman and a surety he absconded and his whereabouts have since then been unknown.

Richard Fritz corroborated that testimony.

The failure of Ross Holzman, when so charged practically with forgery, to assert that Mr. Fritz had signed or authorized the signature to a power of attorney, and his promise to secure Mr. Fritz as to that particular stock, was virtually a confession of the forgery on his part.

A comparison of the signature "Richard Fritz" on the power of attorney with the name "Richard Fritz," as written

on the back of the stock certificate by Otto Fritz, shows that the signature to the power of attorney is an imitation of Otto Fritz's writing of the words "Richard Fritz" on the back of the stock certificate. No testimony was offered by appellant in contradiction of the overwhelming mass of testimony for appellee as to the forgery, excepting that of a Mr. Goettheim, who was secretary for the "Unity Bank" and also a runner in the employ of Holzman & Co., and he claimed to see a similarity between the signatures to the power of attorney and one signature by Richard Fritz written during the progress of the hearing before the referee.

Although a bankruptcy proceeding is in the nature of an equity proceeding, it does not follow that every question of pleading practice and evidence is to be governed strictly by the rules of equity. An issue as to the title to a chattel is in its essential nature a law question.

General Order in Bankruptcy, No. 37, provides that in proceedings in equity for the purpose of carrying into effect the provisions of the act the rules of equity practice established by this court shall be followed, and *in proceedings at law instituted for the same purpose the practice and procedure in cases at law shall be followed as nearly as may be.* This proceeding being to establish the title to a chattel and being in the nature of an action at law, the rules of pleading and evidence at law should govern a determination of the controversy.

In its opinion in 93 U. S., 350, Wiswall *v.* Campbell, the court said: "The form of the proceeding in the appellate court must conform to that of a suit at law; but that does not make the proceeding itself such a suit any more than a proceeding in the circuit court under its supervisory jurisdiction is a suit in equity, because, by section 4986, it is provided that it shall be heard and determined 'as in a court of equity.'"

Fritz a Creditor of Holzman & Co. and Not a Debtor.

The third finding of facts made by the Referee was that "at the conclusion of the dealings between Fritz and Holzman & Co., Fritz was a creditor of Holzman & Co., and not a debtor."

The syllabus of the opinion of the Circuit Court of Appeals in this case (87 U. S. C. C. A., 96) is as follows:

"F, while a customer of the bankrupts, deposited with them fifty shares of C. manufacturing stock as a basis for credit, without signing the power of attorney for transfer, and also deposited certain railroad stock on which he did sign a power of attorney for transfer. The bankrupts forged F's name to a power of transfer of the manufacturing stock and pledged the same to a bank as security for a loan, and also pledged the railroad stock to another for more than its value. On the final closing of F's account with the bankrupt, he was indebted to them in the sum of $930.00, which was more than covered by the railroad stock. Held that the bank was, at most, only entitled to subrogation to the bankrupts' right to hold the manufacturing company's stock for F's indebtedness, and that such facts were insufficient to show that the bankrupts had any equitable right thereto."

The trustee takes no better title than Holzman & Co. had. The "Unity Bank" has no better title than Holzman & Co. had, unless Fritz has been guilty of some act of commission or omission which estops him as against the bank. We do not dispute the claim of appellants as to the law, that an equitable assignment of a certificate of stock may be made by mere delivery without an endorsement. An equitable pledge of stock could be made in like manner. Such equitable assignments or pledges occur where through mistake or fraud a person fails to endorse the certificate notwithstanding his agreement to do so. In this case the only witness as to the agreement under which the "Carey stock" certificate was placed in the possession of Holzman & Co. is

Mr. Fritz. He testified that it was not pledged, but was placed with Ross Holzman to show that he "could make good," if called upon. If that was the agreement between Ross Holzman and Mr. Fritz, the "Unity Bank" is also bound by the limitations of that agreement, unless some grounds of estoppel inure to the benefit of the bank. Counsel for the "Unity Bank" state their suspicions as if they were evidence. To corroborate Mr. Fritz's claim as to the agreement there is the fact that Mr. Fritz did not sign a power of attorney nor the transfer on the back of this certificate. Manifestly a stock broker, such as Ross Holzman was, would not accept a certificate without Mr. Fritz's signature if the stock had been intended to be actually pledged in the ordinary way. Certainly he would not have forged the signature of Mr. Fritz if Mr. Fritz had actually pledged the stock, but he would have insisted at once, upon ascertaining that the signature was missing, upon Mr. Fritz signing. He made no such demand for the signature, but, instead, forged the signature, thereby by that act virtually admitting that the agreement was as stated by Fritz, to merely hold it and not as a pledge. If Ross Holzman knowingly took the certificate without Mr. Fritz's signature it follows necessarily that some understanding between them similar to that which Fritz claims must have been had between them. Fritz had put up this stock without his signature once before, and he had in like manner put up a "Fritz Bros. Co." stock certificate without his signature. Fritz's credit was good with Holzman & Co., and Ross Holzman gave him a certain credit without margin or collateral. What the nature of the transaction with the other stock, or even with this stock at another time, may have been, cannot be considered as affecting the terms of this transaction. To further corroborate Mr. Fritz's claim as to the agreement it appears that the "C., N. & C. stock" and the "Carey stock" were given to Holzman & Co. on May 13th. As to the "C., N. & C. stock" Mr. Fritz signed his name; as to the "Carey stock"

he did not. If there had not been a different agreement as to the "Carey stock" from that as to the "C., N. & C. stock" naturally Mr. Fritz would have signed his name also to the "Carey stock" certificate.

According to the evidence Holzman & Co. did not make demand on Mr. Fritz nor close his account until the assignment. They do not claim to have sold out any of Mr. Fritz's stock for non-payment of any debt. It follows that the "Unity Bank" simply stands in the place of Holzman & Co. with respect to the "Carey stock," and, as Holzman & Co. have no claim for any balance due against Mr. Fritz, but he is their creditor, he would be entitled to the "Carey" shares of stock from the "Unity Bank," even if there had been a definite pledge of those shares as security upon his running account.

Richard Fritz's account with Holzman & Co. was regularly closed at the time of the failure, and upon such closing out of his account on the stock dealings, he was indebted to Holzman & Co. on his stock dealings about $930; but, as Holzman & Co. had, without his knowledge, re-hypothecated his "C., N. & C. stock" with a creditor of Holzman & Co. for more than the value of the collateral that such creditor held, Holzman & Co. were indebted to Fritz to the extent of the value of such "C., N. & C. stock." It had originally been pledged with them for a loan of $2,000. Such loan of $2,000 was included in the items of the statement which showed a balance of $920. Clearly Holzman & Co. at the failure were debtors of Fritz in the sum of about $4,000. As they, Holzman & Co., could not longer hold the "Carey stock" as collateral because they were Fritz's debtors, it clearly follows that their privity, the "Unity Bank," could not do so.

The following testimony is pertinent to the question whether Fritz was a creditor or debtor of Holzman & Co. at the time of the bankruptcy:

Alfred Holzman.

(Rec., p. 143:)

Q. Upon the failure, whatever Mr. Fritz held in the way of stock was sold out at the Stock Exchange?

A. Yes, sir.

(Rec., pp. 148-9:)

Q. Are you not a member of the firm of Holzman & Company?

A. I was.

(Rec., p. 143:)

Q. But since the trustee was appointed, you have assisted in going over the books?

A. Almost exclusively.

Q. You furnished this statement?

A. There is no date on it. That was furnished since the trustee was appointed; the statement taken from the books of all of Fritz's transactions during the month of May, 1905.

Q. Upon the failure, whatever Mr. Fritz held in the way of stock was sold out at the Stock Exchange?

A. Yes, sir.

(Rec., p. 144:)

Q. According to the books then and the terms and the prices, upon your failure on the account, independent of the two certificates for "C., N. & C." and "Carey Preferred," he owed a balance of $970?

A. Yes sir; that is the balance of his stock. I think that has been reduced.

A. I can tell by referring to the ledger. The final balance was $920.02.

Q. *If your company used this "C., N. & C." certificate which had been pledged to cover some indebtedness, he would have been entitled to a claim against that?*

A. *Undoubtedly.*

Q. *So that if the "C., N. & C." certificates were worth $4,500, your company would actually owe him the difference between $4,500 and $920?*

A. *That is right, less the interest on the $920.*

(The statement above referred to was offered in evidence as "Exhibit 14." The part of "Exhibit 14" to which we

desire to call the court's attention is found on the upper half of page 195 of the record. It shows a large indebtedness to Fritz.)

'chard Fritz.

(Rec., p. 106:)

Q. At the time of the failure they did have one certificate of stock with your signature?

A. Yes, sir.

Q. Which was that?

A. That was the Cincinnati, Covington & Newport Railroad stock.

Q. How many shares?

A. Fifty.

Q. This "C., N. & C." fifty shares, was that sold or put up as collateral?

A. It was put up as collateral for $2,000.

Q. State what was said at the time between you and Holzman at the time you placed those fifty shares of "C., N. & C." in his possession, what agreement did you make?

A. Our agreement was for that time that if I needed any more margin, I would produce it. I didn't want him to sell that stock.

Q. You did, however, sign that? (The "C., N. & C." certificate.)

A. Yes, sir, I signed that.

(Rec., p. 107:)

Q. Do you know how much you were indebted to Holzman & Company on your account at the time they were closed out?

A. *According to a statement they sent me that showed that I owed about $900.00 and they owed me at least $9,500 or $10,500, that is, according to their statement.*

Q. How much were these fifty shares worth at the time they failed, I mean the "C., N. & C."?

A. I think they were worth about $4,900; I think that was about it.

(Rec., p. 138:)

"Mr. Horstman (attorney for Richard Fritz) says it was admitted (by counsel for all parties) that the 'C., N. & C.'

stock, the fifty shares of 'C., N. & C.' preferred stock which Mr. Fritz hypothecated with Holzman & Co. to secure his indebtedness was rehypothecated by Holzman & Co. as collateral to secure a loan made from C. I. Dreifus, and that C. I. Dreifus holds collateral notes covering an indebtedness amounting to more than the value of the collateral including that of said fifty shares of 'C., N. & C.' which he holds. *Admitted subject to verification.* This admission is solely for the purpose of this particular controversy, and not regarded as an admission by the bank or trustee for any other purpose."

The Circuit Court of Appeals, in its opinion (Rec., 242-3), disposes of this question as follows:

"Now, upon what ground can it be contended that Holzman & Company have an equitable claim which may be counted against the certificate for fifty shares of the preferred stock of the Carey Manufacturing Company? Obviously, the Unity Banking & Saving Company have no better right than the trustee in bankruptcy could have against the owner of the certificate. The liability of Holzman & Company to account to Fritz for both of these hypothecated certificates is clear. If, therefore, Holzman & Company or their trustee in bankruptcy holds or should hold the certificate for fifty shares of C., N. & C. stock, they have no equity which would enable them to resist the claim of Fritz for the Carey certificate, and if neither Holzman & Company nor their trustee has any equity, it must follow that the appellant has none. But it appears that at some time before bankruptcy Holzman & Company re-hypothecated the C.,N. & C. stock to one Dreifus, and that certificate had been endorsed in blank by Fritz. Dreifus advanced to Holzman & Company a sum probably in excess of the value of these shares. Appellant now contends that inasmuch as Fritz has a proceeding to recover from Dreifus that certificate thus wrongfully transferred to him by Holzman & Company, that if he shall succeed, he will remain indebted to Holzman & Company in a sum stated as of $930. *But as matters stand, the bankrupt has appropriated to its own use this C., N. & C. stock, and is liable to Fritz for its return or value.* Thus, whether we confine the accounting to May 25, the date of the lowest amount of the indebtedness of Fritz to Holzman & Company, or to the final closing of the account, Fritz owes to the bankrupt something over $900.

Against that the bankrupt must account for both of these certificates or return them. *The burden is upon the appellants to show that Holzman & Company have an equitable interest in the shares which they hold to which they should be subrogated. It will not do to say that possibly Dreifus may not be able to hold the shares wrongfully rehypothecated to him.* That certificate has been, as we have said, endorsed in blank by Fritz. Holzman & Company were apparently authorized to assign it. *The burden was upon the appellants to show a right to subrogation to some equity which Holzman & Company have.* This they have not done. Judgment affirmed."

As to the Defense of Gambling Transaction.

The answer of the "Unity Bank" to the amended petition of Richard Fritz does not allege any gambling transaction on the part of Fritz as a defense. Mr. Fritz therefore had no occasion or opportunity to offer all the evidence he might have offered as to the regularity of his dealings with Holzman & Co. Neither the referee, nor the District Court, nor the Circuit Court of Appeals found that there was any gambling transaction involved in this case. The uncontradicted testimony shows that the shares of stock dealt in by Mr. Fritz were actually bought and sold and delivered at the New York Stock Exchange, of which Holzman & Co. were members. Nevertheless, because large credits were allowed, with the stock in part as security, and because Fritz, from time to time, bought and sold, counsel for appellant persist in characterizing these dealings as gambling transactions. In a very broad sense most business purchases which are not made for personal consumption by the purchasers are speculations or gambling transactions. What are gambling transactions in law is to be determined by the statutes. If the purchases and sales of stock made by Fritz through Holzman & Co. were gambling transactions, then all or nearly all of the purchases and sales of stock on the New York Stock Exchange are gambling transactions. The statutes of

Ohio, upon which counsel for appellant relies, are quoted in his brief (pp. 19, 20, 21). Those statutes merely define and prohibit "bucket shops," where pretended buying or selling of stocks or other property takes place. Said sections impose penalties for *conducting* "bucket shops."

The following testimony conclusively establishes that Holzman & Co. were not conducting a "bucket shop," but that these purchases and sales for Fritz were actually made on the floor of the New York Stock Exchange, and that there were actual deliveries of the stock in each transaction.

Alfred Holzman.

(Rec., pp. 143-4:)

Q. You were a member of the firm of Holzman & Company?

A. Yes, sir.

Q. Upon the failure, whatever Mr. Fritz held in way of stock was sold out at the Stock Exchange?

A. Yes, sir.

Q. Your firm always bought and sold the stock?

A. Absolutely.

Q. Your customers bought stocks?

A. Yes, sir.

Q. Simply acted as brokers or commission merchants?

A. Yes, sir. I suppose so.

(Rec., pp. 147-8:)

Q. When your company received orders from a customer to sell for them, you thereupon made sales on the New York Stock Exchange through your correspondent?

A. Our man would make out a slip, give it to the telegraph operator and that would be transmitted to a New York broker at the other end and he would thereupon go to a New York Stock Exchange or give it to a Stock Exchange broker.

Q. Did you have a regular correspondent?

A. We had a correspondent member of the New York Stock Exchange.

Q. Who was it?

A. J. C. Bache & Company.

Q. *When you sold stock for a customer, you were compelled to put up by the rules of the Stock Exchange, the actual number of shares you sold, at the end of the day, or the next day?*

A. *The next day.*

Q. That is the universal custom of brokers?

A. It is the custom. It is a rigid binding law of the Stock Exchange.

Q. *You could not trade there unless you would put up the actual certificates to the amount of the sale?*

A. *No, sir.*

Q. That rule of the New York Stock Exchange is known throughout all the brokerage business, is it not?

A. I suppose when a New York broker joins a New York Stock Exchange, he has to know that rule.

Q. All your dealings of buying and selling stocks were made with reference to the rules of the New York Stock Exchange?

A. Yes, sir.

Q. Your customers were apprised of that fact?

A. They were on notices of the New York Stock Exchange.

(Rec., pp. 148-9:)

Q. Are you not a member of the firm of Holzman & Company?

A. I was.

Q. Of Feder, Holzman & Company?

A. Yes, sir.

Q. It was a bankers' and brokers' business?

A. Yes, sir.

Q. Was that buying and selling stock and other securities on orders from customers?

A. Yes, sir.

Q. Executing those orders upon the various stock or other exchanges?

A. Yes, sir.

Q. Holzman & Company owned a seat in the New York Stock Exchange?

A. Yes, sir.

Richard Fritz.

(Rec., p. 120:)

A. When I traded with Holzman & Company, it was a legitimate business. They were members of the Exchange, and I thought it was legitimate. Sometimes I would carry it over a period of a month. If I felt like it I would sell out. Sometimes it would go down four or five points.

Clearly such purchases and sales are not gambling transactions. The statutes of Ohio, above referred to, relate only to persons operating "bucket shops." A person dealing with a "bucket shop," under section 4270, Revised Statutes of Ohio, may even recover the amount of money lost or deposited by him with the "bucket shop," together with a penalty in his favor. There is not the slightest testimony tending to show that the transactions of Fritz with Holzman & Company were "bucket shop" transactions. Even if they had been, such transactions had no legal connection whatsoever with the transactions pertaining to this "Carey stock" certificate, which, according to the undisputed testimony of Fritz and the finding of the referee (Rec., p. 38), was "deposited with Holzman & Co. upon an express contract that it was simply to be held to show Fritz's responsibility and not to pass out of Holzman & Company's possession, and that at no time was any demand made upon him, or notice served upon him, changing the conditions of this contract."

The Court without Jurisdiction on Appeal.

Appeal does not lie in this case to this court for the reason that the controversy is not one which might have been taken from the highest court of the State to the Supreme Court of the United States, nor has any justice of this court certified that, in his opinion, the determination of the question or questions involved are essential to a uniform construction of the bankruptcy act throughout the United States, nor has this controversy been certified to this court from any other

court of the United States. (Section 25*b*, of the Bankruptcy Act of 1898.) Nor did the Circuit Court of Appeals have authority to entertain the appeal. The order of the District Court is final.

105 Fed. Rep., 187, *In re* Whitener (Rodgers *v.* Ramseur):

"The proceeding in the court below was a proceeding in the administration of the bankrupt's estate, and was in no proper sense a proceeding to allow or reject a debt or claim against the bankrupt's estate, and we are inclined to the opinion that in matters of administration in the bankruptcy court outside of the question of bankruptcy, *vel non*, the discharge of the bankrupt, and the allowance of debts or demands of over five hundred dollars, no appeal is allowed or contemplated by the bankruptcy law of 1898."

105 Fed. Rep., 180:

Syl. 2. "Under the Bankruptcy Act of 1898, no right of appeal exists from any judgment rendered, or order made by a court of bankruptcy in the administration of estate, except the particular judgments enumerated in section 25; and no appeal lies from a judgment entered on a petition of intervention filed by a claimant of property in the hands of a trustee declaring the ownership of the intervenor, and ordering restitution of the property, such judgment not being one allowing a 'claim' within the meaning of section 25*a*, subdivision 3."

110 U. S., 741, Leggett *v.* Allen:

"This court has no jurisdiction to review a judgment of the Circuit Court, rendered in a proceeding upon appeal from an order of the District Court rejecting the claim of a supposed creditor against the estate of a bankrupt." (Affirming 93 U. S., 350, Wiswall *v.* Campbell, Act of 1867.)

198 U. S., 280, First National Bank of Chicago v. Chicago Title & Trust Company:

Syl. "The trustee in bankruptcy claiming the right of possession of certain merchandise of the bankrupt in storage,

warehouse receipts, which he had hypothecated for loans, instituted summary proceedings for possession and direction for sale in the district court. Claimants, who were the warehouse men and holders of the warehouse receipts, objected to the jurisdiction, but were overruled. The district court held the claimants were entitled to the property.

"Held that, as the proceeding was one in bankruptcy, there was no appeal to the Circuit Court of Appeals and its jurisdiction was confined to revision in matter of law on notice."

In the case in 198 U. S., 280, this court made certain other rulings, because the property was not in the possession of the bankruptcy court and the jurisdiction was contested, but in the case here at bar the certificate was in possession of the bankruptcy court and its jurisdiction was expressly submitted to by all parties.

Further Comments on Brief for "Unity Bank."

On page 6 of their brief, counsel for appellant say that the "Unity Bank" was innocent of any wrong. So we say was Richard Fritz, unless leaving an unsigned stock certificate, without any power of attorney attached, in the hands of Holzman & Co. can be construed to be a wrong. On pages 7 and 8, they argue that there was no need of a writing to make a good pledge of the "Carey stock" certificate. That proposition we do not deny, but there is no evidence whatsoever of any pledge as to that certificate other than the mere fact that Mr. Fritz placed the unsigned certificate in the hands of Ross Holzman. Mr. Fritz testified that he told Ross Holzman he left it there just to show that he could make good if called on for money. However, even if he had expressly pledged it without his signature, the "Unity Bank" could acquire no greater interest in the certificate than Holzman & Co. had. If placing it unsigned with Holzman & Co. could be construed to be a pledging of the stock, it could be a pledging of it only to secure Mr. Fritz's running account, and as Holzman & Co. were debtors of Fritz, and not creditors, at the time of the

closing of the dealings, Holzman & Co. could not hold the certificate because there was no longer anything to be secured by it. Mr. Fritz, not even having knowledge that the bank had the certificate, and not having signed it or any power of attorney, and not having done anything to mislead the bank, could not be estopped as against the bank any more than he could be as against Holzman & Co., from reclaiming the certificate. On page 9, their brief criticises Mr. Fritz's answers as "labored and evasive." On the contrary, his testimony is direct and consistent throughout. The absence of his signature and the forgery of his signature are entirely consistent with his explanation as to how the certificate was left with Ross Holzman.

Men naturally are reluctant to place their stocks, with signatures attached, in other persons' hands. If Mr. Fritz had not expressed an unwillingness to sign a power of attorney as to the "Carey stock," Ross Holzman would not have forged his signature, but would have sent for him and would have requested or demanded that he sign. The amended petition alleges that Fritz is the owner of the "Carey stock" certificate and entitled to the possession of it free of all claims. We do not understand that Mr. Fritz, in any event, was bound to allege in his pleading how he came to be the owner, nor to set up the grounds upon which the trustee and the "Unity Bank" claimed the certificate or claimed some interest therein. All the incidental questions arising out of a bankruptcy are parts of one case, the bankruptcy case. The hearings before the referee may be upon motion, affidavit, application, &c. No formal pleadings are required. A summary method of procedure is authorized. On page 32 appellant's brief says Richard Fritz adopted the signed power of attorney. How Mr. Fritz can be held to have adopted a forged signature to a power of attorney when he did not know, and had no reason to know, of its existence, until after all the transactions were closed, we cannot comprehend. On page 33 their brief says the referee had some hesi-

tancy in finding against the "Unity Bank," and a few words from a lengthy opinion are quoted in support of that statement of the brief. The court will find, upon reading the whole opinion, that the referee unhesitatingly, unequivocally and emphatically decided each and every question of fact and law in the case in favor of Mr. Fritz. The District Court and the Circuit Court of Appeals both complimented the referee upon his able and exhaustive opinion. On page 34 appellant's brief says the circumstantial evidence shows conclusively that the power of attorney was Fritz's, either by actual execution or by adoption. There is no circumstantial evidence upon that point. Mr. Fritz had no knowledge and no means of knowing that his signature had been forged to the power of attorney. Further, on page 34, they say that the referee wrongfully placed the burden of proof on the "Unity Bank." The "Carey stock" certificate, prior to the hearing of the testimony, was placed in the custody of the court, or trustee who claimed an interest in it. Mr. Fritz and the "Unity Bank" also claimed an interest. It would seem that the burden of proving the signature of Mr. Fritz, under those circumstances, was upon the bank, just as the burden of proving ownership was upon Mr. Fritz. In any event the testimony conclusively showed, and the referee found, that the testimony of Mr. Fritz to the effect that it was not his signature was corroborated by the inspection and comparison of signatures, and by the testimony of numerous persons having knowledge of Fritz's signature, and by the testimony of Theodore Horstman and Richard Fritz as to the virtual confession of forgery by Ross Holzman and that the signature was not that of Richard Fritz. Even if the burden of proving the genuineness of the signature was not on the "Unity Bank," nevertheless, as there was neither evidence nor circumstance tending in the slightest degree to show that the signature was genuine and as there was the direct evidence of Fritz and testimony of numerous persons familiar with his signature to show that it was not his signature, and also, the comparison of the

signature with other known signatures of Fritz that were in the case, all going to show conclusively that it was not his signature, it is wholly immaterial where the burden of proof lay in this particular case. On page 36 appellant's brief says that the bankrupts had the right to re-hypothecate the "Carey stock." If, as Mr. Fritz testified, the understanding with him was that Holzman & Co. were not to let the stock go out of their hands, clearly no custom could give Holzman & Co. the right to re-hypothecate the stock. The custom of the New York Stock Exchange, to which counsel refer, is the custom of re-hypothecating the identical stock bought on margin, and not other collateral. If the stock had been pledged by Fritz with Holzman & Co., they might have had the right to assign this pledge to another party, but that other party would take the pledge under the assignment, subject to the same conditions as Holzman & Co. had it, that is to say, as collateral to secure Fritz's running account indebtedness. Inasmuch as Fritz was not indebted to Holzman & Co. when the deal was closed, because Holzman & Co. had converted to their own use $4,900.00 worth of "C., N. & C. stock" belonging to Fritz, and because they had thereby become his debtor, clearly the assignee of the pledge could not hold the stock as collateral for Holzman & Company's debt to the assignee. Appellant's brief further says, on page 45, Fritz was negligent and must bear any loss that may occur. This is a naked assertion without any proof whatsoever in support of it, unless it constitutes negligence in law for the owner of stock to leave an unsigned certificate therefor in the physical possession of some other person.

Counsel for appellant, on page 46, grossly misrepresent the testimony when they refer to "the testimony of Alfred Holzman that Richard Fritz brought in the signed power of attorney and represented to Ross Holzman that it was signed by himself." We are amazed that counsel should, in the face of the explicit language of the record, make such a misstatement of the evidence to this court.

On that point, Alfred Holzman (Rec., pp. 144, 145) testified:

"Q. Mr. (Alfred) Holzman, let me ask you whether Ross Holzman, before he left and before the adjudication in bankruptcy, stated to you that, so far as he knew, Richard Fritz did not sign this power of attorney?"

"A. I do remember that Ross said, 'I have my trouble with Fritz now.' I asked him why. During the time we were seeking the settlement, after the petition in bankruptcy was filed, I said: 'Why, what is the trouble?' He said: 'He claims he did not sign his fifty shares of Carey.' I said: 'Did he?' He said: 'How should I know.' 'He brought it in and I don't know whether it is his signature or not.' I said: 'What are you going to do about it?' He said: 'I don't know; Horstman wants me to make some kind of agreement. I suppose I have to make it.' "

It will be observed that Ross Holzman did not testify at all, he having absconded, and Alfred Holzman merely undertook to state what his brother Ross had said to him. Clearly that was not evidence. Furthermore, the above answer was ruled out upon objection. If Ross Holzman did say that, it would, under the circumstances, tend to corroborate rather than refute Richard Fritz's evidence that the signature was forged by Ross Holzman. It will be remembered that Richard Fritz, after the bankruptcy, had, in the presence of Theodore Horstman, his attorney, said to Ross Holzman that if there was any paper outstanding purporting to have his signature attached to the "Carey stock," it was a forgery. What Ross Holzman may after that have said to his brother in exculpation of himself is certainly not evidence. The testimony of Horstman and Fritz is to the effect that when Fritz so spoke to Holzman, Ross Holzman did not claim that Fritz had signed or authorized the signing of such paper, nor that Fritz had brought the paper to him with the signature attached. He remained silent on that point, but made a proposition to secure Fritz to the full

value of the "Carey stock," thereby virtually confessing his guilt of the charge of forgery.

Counsel for appellant, on page 2 of their brief, say there was a balance of $4,965.78 due the "Unity Bank" from Holzman & Co., after all their collateral, except the "Carey stock," had been sold and exhausted. There is no evidence to that effect. The statement (Exhibit 3) shows considerable other collateral still on hand.

Respectfully submitted,

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